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ABSTRACT

Examined here is the role of the courts as educational policy makers regarding church-state separation in the United States and Australia. The first part examines the relationship of the public schools to religion, both regarding the teaching of religion in the schools and compulsory education. It is noted that in spite of challenges, the courts have upheld "general" (rather than sectarian) religious teaching in Australian schools. The second part of the paper examines litigation concerning private schools in both countries, especially regarding government aid. It was found that in the United States, private school aid is tightly judicially policed, though very limited aid is allowed. In Australia, however, state aid to private schools is mandated by the legislature and unchallenged by the courts. Policy implications of the laws on church-state relationships are discussed, especially regarding the future of government aid to private schools in both countries. It is concluded that in the United States, legislation benefitting mainly the nonpublic sector is unlikely to withstand judicial challenge, though aid might validly flow to the nonpublic sector when benefitting a broad class of beneficiaries and promoting public welfare. In Australia, private school aid, entrenched in the platforms of all major political parties, is likely to continue to have considerable public support. (Author/JM)

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Nonpublic education in the United States of America and Australia : the courts in educational policymaking[1]

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Introduction

Nonpublic schools provide parents with an alternative form of education to that offered by governments and one which is in increasing demand, as enrolment figures demonstrate, in both the United States of America and Australia.[2] By far the majority of those schools is under the auspices of religious denominations and societies. As such the schools and, therefore, the major source of alternative schooling stand in the shadow of provisions of the first amendment of the American constitution - Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof - and section 116 of the Australian constitution - The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion - not to mention the various states' provisions in the U.S.A. and that of one state in Australia. Judicial interpretation of these provisions might be expected to impinge on the capacity of governments to encourage or restrain the development of this alternative education and raise, as it has, the question of church-state relations.

The church-state debate is not, however, restricted to the public and nonpublic school arena. It goes to the heart of the public provision of education in both America and Australia, in that religious exercises and religious instruction have been part of government school systems since their establishment. And again the judiciary has been involved in this question in being asked to determine what is and what is not permissible in law.

This paper examines the role of the courts as educational policy-makers with respect to the church-state debate in two parts: first as it

affects what has gone on inside the public system of education and, second, as it affects the existence of the nonpublic sector particularly in relation to government subvention. In so doing, only passing reference is made to the historico-political context of the state-aid issue, which is a study of itself. What is dicussed, however, are the policy implications for governments and education administrators given the judicial decisions.

The U.S.A.-Australia comparison has been pursued in that, apart from any exchange of educational ideas between the two countries, the American constitution in general and the first amendment in particular were of considerable influence in shaping the Australian constitution and section 116. While discussion of the relationship between these instruments will occur in what follows, one crucial difference should be noted at the outset. The Australian constitution contains no equivalent to the fourteenth amendment and its provision that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws' despite an attempt to incorporate such a provision.[3] In Cantwell v. Connecticut the Supreme Court held not only that a law of congress in violation of the first amendment provisions on estblishment and free exercise was invalid, but also that the fourteenth amendment 'rendered the legislatures of the states as incompetent as Congress to enact such laws'.[4] In Australia, however, there is no provision which would enable the High Court to make a similar assertion about the laws of the states. Findings on section 116 only have force with respect to laws of the national parliament. This distinction between the two constitutions is of considerable important in the church-state debate.

I

Religion and Schooling

1. Promoting religion in public schools

The decision in Cantwell v. Connecticut placed the Supreme Court in America in a position to determine, by its interpretation of the first amendment, among other things the place of religion in public schools thoughout the country - schools which were a states' responsibility. The run of cases from McCollum[5] to Schempp[6] clearly established that the Court will not entertain on-site encouragement of religion either from outside religious groups or in such acts as Bible reading and praying. In the former case, a practice which enabled religious groups, through representatives approved by the superintendent of schools, to conduct classes in religion in Champaign, Illinois, schools at a time within the stipulated compulsory attendance requirement and from which there was a right of withdrawal was held to be in violation of the first amendment. The Supreme Court maintained that the practice complained of was at variance with its declared principles that the first amendment required a separation of church and state and the need for the state to display a neutral attitude towards religion.

In the latter case, the statutory provision in Pennsylvania which required verses to be read daily from the King James version of the Bible along with the saying of the Lord's Prayer, albeit on a voluntary basis, was deemed to have as its purpose and primary effect the advancement of religion and was, therefore, in violation of the first amendment.

So comprehensive were the majorities that it now has to be accepted that a reversal of opinion on the establishment clause, as the law now stands, is unlikely. The public schools' formal role[7] in the promotion of religion is, therefore, limited to the guidelines which may

be gleaned from Zorach v. Clauson[8] for off-site religious practices. In that case, the Supreme Court, (not without trenchant criticism of the decision by the minority) decided that a released time program permitting students to leave schools in New York City during compulsory school hours to attend, on a voluntary basis, religious instruction provided by representatives of those religions was not a violation of the first amendment. Such a program was not seen as being in advance of religion nor as breaching the wall between church and state.

Events have taken a different turn in Australia where legislative provision and judicial interpretations pose few obstacles to state promotion of religion in public schools.[9] In the most populous state, New South Wales, for example, the legislation prescribes how much time will be given to secular instruction and, in addition, for time to be allowed for 'special religious education' to be provided on site by visiting clergy and authorized denominational representatives.[10] Provision is made for parental objection to children attending such instruction and that objection itself is complete cause for the withdrawal of students for such classes in religious teaching.[11]

The rub, however, is in the definition of 'secular instruction' in the legislation. The relevant part of the section reads:

> In all schools under this act the teaching shall be strictly non-sectarian but the words 'secular instruction' shall be held to include general religious teaching as distinguished from dogmatical or polemical theology ...[12]

Provision for similar state-abetted religious teaching in public schools appears in the education legislation in the remaining five states varying from this type of general provision to requirements that Bible lessons shall be taught, as pertains in Queensland.[13] Nationwide, promotion of religious teaching is, therefore, in force in Australia.

The force of the New South Wales provision was tested in that

state's Supreme Court by a parent with a child attending a public school, who objected to the religious activities in the school and claimed that, as a matter of statutory interpretation, 'general religious teaching' called for both teaching about Christianity and teaching about other religions. This case was of considerable importance in that it marked a rare resort to the judiciary on an educational matter. It should also be noted that the case marked something of a culmination in the running war between humanists and church persons on the question of religious education - general and special - in public schools.

In Benjamin v. Downs the court held that general religious teaching meant teaching in the Christian religion and that the saving clause in the section was to prevent 'the beliefs of any one church being advanced over others, and to ensure a lowest common denominator for general religious teaching'.[14] It was also decided that religious acts such as prayers and grace before lunch which were complained of here were activities within the formal school program and were, therefore, part of the general religious instruction.[15] Although only a single judge's decision this judicial imprimatur seems to have laid to rest any doubts as to the force of the legislation and the continued role of the state in promoting religious education in public schools.[16] It is, however, of effect in only one state although it might be persuasive elsewhere. Also, it is a decision limited to the question of statutory interpretation since New South Wales has no constitutional provision of the first amendment type. Section 116 of the Commonwealth constitution could not be called in aid since it only has force with respect to Commonwealth laws. Apart from hoping for a different statutory interpretation in the appeal courts, the plaintiff exhausted the limited options to challenging the promotion of religion in public schools.

2. Compulsory education laws and religious commitment

In both America and Australia the states' interest in requiring compulsory education may have to give way to parental interests involving religious commitment. In the former, in Wisconsin v. Yoder, the Supreme Court held that the interests of Amish parents overrode that of the State of Wisconsin to the extent that prosecutions could not be maintained against parents who failed to comply with the compulsory education requirements.[17] The case is limited in that the court noted that for the Amish religion and life were inseparable and that the children concerned had attended school until the successful completion of the eighth grade leaving them two years short of the compulsory attendance requirement. The court was prepared to allow the state's interest to be overridden by that of parents but only in that the latter's claims were rooted in religious beliefs and of the sort known to the Amish - a condition which would not apply, for example, to persons simply pleading an alternate life style. The court also declined, in the majority opinion, to go to the question of the competing rights of the child and the parent in that that was not at issue in this case. Wisconsin v. Yoder does not, therefore, provide unduly wide scope for parents to assert their interests on religious grounds over and against compulsory education laws.

Given the absence of case law on the question in Australia, recourse can only be had to statutory provisions. While there are some, such as section 30 of the Western Australian Education Act,[18] which allow parents to withdraw children on set days to attend religious observances of the religious body to which the parents belong, the main provision is that which allows parents to submit as a lawful excuse for non-attendance at a public school that regular and efficient instruction is being provided at home or elsewhere. Whether such instruction is being offered

is usually determined by the state and in terms of the type of curriculum offered in public schools and at standards comparable with those schools. The statutory provisions in Australia, therefore, provide alternatives which may, given the limitations in Yoder v. Wisconsin, provide more latitutde to parents than that existing in America. But without that alternative regular and efficient instruction there are no grounds for parental interests to override those of the state since one is confronted again with the lack of constitutional provisions akin to that of the first amendment except in the state of Tasmania where there is a free exercise provision but one which has never been tested in this regard.[19]

II

State-Aid to Nonpublic Schools

This treatment of state-aid to nonpublic schools comprises first an overview of the nonpublic school sector followed by a review of the opposition to state-aid in the United States, an outline of the movement to state-aid in Australia, and an analysis of the legal aspects of the national differences.

1. The nonpublic sector

As an introduction to the question of state-aid, reference is made to the constituents of the nonpublic sector in America and Australia, the formal legal bases of that sector and the state-aid now obtaining in both countries.[20]

Figures available in the U.S.A. indicate that some 10 percent of the school population is enrolled in the nonpublic sector with considerably higher proportions of such students enrolled in the larger cities headed by Buffalo, Chicago, and New Orleans with percentages of 33.8, 27.3 and

27.2 respectively.[21] Australian figures show that 20 percent of school-age children attend nonpublic schools with a slightly lower percentage in primary (elementary) schools but rising to 25 percent of high school students.[22] There is no easy answer to the question as to the difference in the numbers in the two countries. The historical traditions and early emphases of the two nations may be significant factors. It is possible that the confidence expressed by Americans in the public schools in one study does not have its parallel in Australia where, in some states, it appears that public confidence in state schools has waned.[23] There is also the possibility that in Australia, given the markedly lower retention rates of students to the twelfth year, the nonpublic schools are perceived by parents as a worthwhile investment in terms of job opportunities for school-leavers. As elusive as the reasons are, given the lack of research, the facts are plain.

There is common ground between the two countries in that Roman Catholic schools predominate in the nonpublic sector but there is a less high proportion of Lutheran and Jewish schools in Australia than in America.[24] While there is a sprinkling of other denominational schools in both countries, the proportion of nonaffiliated schools in the U.S.A. is considerably greater and assumes quite high proportions in some, particularly the southern, states. These denominationally nonaffiliated schools which quite obviously fall outside the profile of the sectarian school as defined in Nyquist,[25] escape the problems of the establishment clause as far as state-aid at the federal level is concerned but may still fall foul of state legislation. In Massachusetts, for example, Article of Amendment XVIII, section 2, stipulates no state-aid unless schools are publicly owned and under public control.

In terms of the composition of nonpublic schools, the range in size in America is larger than that in Australia, varying from quite a

low number to as many as more than two thousand.[26] The upper and lower limits would be more contracted in Australia, with the most common size of school in both countries being in the 150-400 range. A common problem in both countries has been the need for Catholic schools to employ more lay teachers and for the need for upgrading qualifications among teachers. The students appear to be drawn from a wider range of socio-economic backgrounds than is sometimes thought. The range of wealth varies considerably in each country with both having their Andovers and Melbourne Grammars on the one hand and the somewhat impoverished Catholic Parish schools on the other.

Both countries have elites among the private schools - groups of schools identifiable by associations and jealous of it.[27] Such schools have traditionally been single-sex schools and have tended to concentrate on secondary education although some have moved towards coeducation and primary education. Boarding facilities have been part of the fabric of these schools although such a provision is not exclusive to them. Some of the remaining nonpublic schools may have similar characteristics but the dominant number comprises the Catholic primary coeducational day school.

There also appears to be common ground in America and Australia in terms of the student base of the nonpublic sector. Reasons for attending such schools range from old-boy networks, to religious conviction, to ethnic commitment, to the satisfaction of the ambitions of parents, to those seeking a viable alternative to the public system whether for educational or political, ideological or practical reasons or a mixture thereof.[28]

As to the role of the nonpublic schools in society, opinions range across a wide spectrum in both countries. Opponents of state-aid

tend to concentrate on the alleged elitism of these schools and their disservice of social divisiveness. Proponents are usually unabashed by the former charge and counter the latter by pointing to the service to the community of such schools at least in terms of alleviating the demand on the public purse and in providing individuals with alternatives in schooling.

Legal foundations of the nonpublic sector

A nonpublic sectarian educational sector has been guaranteed a place in American education by the decision in Pierce.[29] In that case an Oregon statute which required parents to send their children only to public schools was held to be in violation of the fourteenth amendment in that a religious order and a military academy were deprived of property without due process of the law, the property here being tied to the loss of students which flowed from the enforcement of the law. The statute was also seen to be an unreasonable interference 'with the liberty of parents and guardians to direct the upbringing and education of children under their control'. Although Pierce was decided on the basis of doctrine with respect to due process no longer in vogue in the Supreme Court, the case remains precedent for asserting that whilst state control of education remains undisputed, state monopoly is anathema. It also suggests a right in parents to determine which schools their children shall attend - an assertion which sits uncomfortably beside the decision in Rodriguez[31] in which the Court decided that education was not a fundamental interest. Unclear as the right to educate or not to educate may be, the American situation is one in which the existence of the nonpublic sector is guaranteed.

In Australia, however, noting again the absence of equivalents of the fourteenth or other amendments, the nonpublic sector exists at the pleasure of legislatures which could, by their fiat and with constitutional impunity, require all children to attend public schools or, for that matter,

nonpublic schools. Such laws in the states would not violate constitutional provisions except insofar as a connection could be made with such laws and the right to free exercise of religion in the state of Tasmania. Also Commonwealth laws for its territories would be subject to section 116. The only other likely intervention by the courts would be by way of actions requiring interpretation of statutory provisions. The lack of a judicial guarantee for a nonpublic school sector is of little moment in that political realism is guarantee enough for continuation of the two sectors in Australia. What is of interest in that country and in America, however, is the means by which the nonpublic sector can be publicly regulated.

In the fifty-six state systems in the two countries, the range of control is wide. On the one hand, quite liberal provisions pertain in some cases. South Australia, for example, imposes no state regulative restraints on the nonpublic school sector and in New York state registration is required of private schools, which term, by definition, does not include schools under the auspices of an 'established religious group'.[33] On the other hand, there is quite strict legislative control of the nonpublic sector in some jurisdictions and this is more representative of the position in most states. Under Massachusetts law, for example, compulsory attendance is required at a public school 'or some other day school approved by the school committee'.[34] Further, approval shall be given in that the studies required by law are taught and that instruction 'equals in thoroughness and efficiency, and in the progress made therein that in the public schools in the same town'.[35] A somewhat comparable position obtains in Western Australia as in most of the Australian states. There a 'reasonable excuse' to a charge of not causing a child to attend school is that the child is attending an efficient school.[36] Persons operating nongovernment schools are required to seek registration of the school, which shall be granted if 'found to be efficient [by the Minister or his

nominated Superintendent] as to the instruction given' a slightly less rigorous test than that required in Massachusetts.[37] Registered schools may be inspected and removed from the register of efficient schools when found not to be efficient.[38] The major difference between Massachusetts and Western Australia and one reflecting the national differences is that while legislation in the former lives in the shadow of Pierce there is no similar judicial overarching in the latter.

State-aid assistance to the nonpublic sector

State-aid to nongovernment schools is a matter of fact in America and Australia - limited in the former, much less trammelled in the latter. While it is difficult to determine a dollar figure for state-aid to the nonpublic schools in the United States from federal and state sources, the forms of assistance can be documented. These include state-aid which is available as part of a general benefit available to all children as with transportation to and from school, textbook supplies limited to the needs of secular teaching, and general services in aid of the health and safety of students. Less wealthy students are the particular recipients under categorical federal grants as provided under Titles I and IV of the Elementary and Secondary Education Act as amended, while other disadvantaged students such as the handicapped and those held to be in need of bilingual education receive assistance under the act and other federal and state legislation. The state-aid provided, while of not inconsiderable financial dimensions, does not normally assist in the amelioration of costs central to school budgets such as staffing and capital costs.

In Australia, in addition to the support given to meet special needs, state-aid to the nonpublic sector is calculated in terms of general educational costs. In 1979, for example, the federal government alone expected to pay $201 million in state-aid. The amounts paid ranged from

$146 to $305 for each pupil in a primary school and from $217 to $454 for high school students.[39] Together with the states' subventions which are expected to be in general of equal proportion, governments aim to provide private schools with 40 percent of the cost of providing public education for a child in the respective category and that figure is exceeded in a considerable number of cases, especially where small catholic parochial schools are concerned.

Against this backdrop of somewhat limited state-aid judicially policed in America, and generous and legislatively entrenched state-aid in Australia, the developments in each will be explored.

2. Close checking state-aid in the United States of America

Amendments to federal and state constitutions mark the formal declaration of the majority of the American people that state-aid may not be made available to the nonpublic school sector. The first amendment now blankets the federal system with its no establishment provision. In addition, most states also have constitutional prohibitions against state-aid as, for example, in Article IX of the New York state constitution[40] - not that such safeguards automatically preempt attempts even in legislatures to provide state-aid.[41] But on the other side are the ever alert opponents of state-aid and guardians of constitutional provisions - bodies such as the organizations for Public Funds for Public Schools in New Jersey and the Committee for Public Education and Religious Liberty in New York - whose names dot the cases. Proponents of state-aid face tough odds in confrontation with an opposition which includes legislatures and the judiciary as well as particular lobby groups and a general public opposition to state-aid, which is to be distinguished from the establishment per se of nonpublic schools, which has had public acceptance.[42]

Nonetheless, some advantages have been gained. Supporters of state-aid have benefitted from a number of decisions relating to programs

mentioned above. These decisions include that in Everson[42] in which the Supreme Court held valid the provision out of the public purse for the transportation of children attending nonpublic schools. That Everson is well settled is indicated by the Supreme Court in its decision summarily to affirm a lower court finding that a Pennsylvania statute requiring, among other things, that school districts provide transport for students attending certain private nonprofit schools was valid.[44] Another fairly settled issue which also went in favor of the nonpublic sector arises from the run of cases from Cochran[45] to Wolman[46] in which the provision of secular textbooks to students in nonpublic schools was held not to be in violation of the establishment provision. The latter case slightly lessened the pressure on the budgets of the nonpublic sector by making available to those schools publicly provided services such as diagnostic, speech, hearing and psychological tests, and therapeutic and guidance services. An earlier decision providing further benefits to the private sector came in Walz[47] in which the challenge to legislation enabling gifts to religious schools to be allowed as tax deductions was unsuccessful.

On the debit side, however, the Supreme Court has ruled out several attempts to widen the application of state-aid, varying from services to schools to direct benefits to the taxpayer-parents of the children in those schools. The line was drawn in Wolman, for example, at the supply from public resources of instruction equipment and material, and field trip transportation and services to nonpublic school students. Major reversals were suffered by the pro state-aid lobby in decisions affecting teachers' salaries and building maintenance. In Lemon v. Kurtzmann[48] the court held as being in violation of the first amendment a Pennsylvania statute providing for the use of public funds in support of the salaries of teachers in nonpublic schools even though limited to

teaching of or in secular subjects. The rebuff to public aid for building maintenance and repair came two years later in Nyquist.[49] In addition, the decision in that case put paid to attempts to provide cash benefits to the parents of non-public school students by means of tax credits, a decision reinforced by the decision of the court summarily to affirm a lower court decision which found unconstitutional a New Jersey income tax law which provided for deductions for expenses incurred in the education of children at parochial schools.[50] State-aid proponents have, therefore, had a chequered career before the judiciary with considerably severe reversals in their attempts to broaden the base for the provision of state-aid.

3. From proscription to imprimatur: the Australian reversal

The legislature outlaws, the legislature restores: that is the story of state-aid in Australia. The judiciary, so prominent in the U.S.A., has yet to bring down a first decision on the state-aid question which has remained, therefore, one for governments and parliaments to determine.

At the turn of the century the states in the new federation had all settled for centralised systems of education under a department of state in the traditional Westminster model. The free, compulsory and secular education acts were almost universally established and in force. While nonpublic education was permitted, state-aid was generally anathema. In Western Australia, for example, the state actually compensated the assisted schools to the tune of fifteen thousand pounds for appropriating the educational undertakings taken over in the public interest. The same legislation prohibited the payment of public funds to nonpublic elementary schools.[51] In keeping with the changing national mood, however, the Education Act was amended in 1955 to provide that 'Notwithstanding anything to the contrary in the Assisted Schools Abolition Act, 1895, the Treasurer of the State shall ...'.[52] During the two decades following, state-aid was

extended to the provision of government publications and stationery to nonpublic schools, assistance with interest payments for capital works, direct grants to schools, payments to students for textbook purchases and subsidies for the construction of swimming pools. This provision of comprehensive state-aid was in vogue in all states. Given the lack of any establishment clause in any state constitution, no judicial challenge was possible and state-aid remained a decision of the legislature.

The federal government, too, became involved in state-aid even though it had no direct responsibility for school education in the states. Some early support had been given by means of taxation concessions.[53] It became more actively involved in the 1950s, first in its own territories when it assisted in the financing of loans for capital costs in nonpublic schools, and directly and nationally in school education in 1963 when Prime Minister Menzies promised, in opening his party's campaign for the imminent national election, assistance for science laboratory construction and scholarships for students, the former directed to the nonpublic sector, the latter available to all students.[54] The opposition Labor Party formally opposed to state-aid from 1957 changed its platform within a decade and, with its coming to power in 1972, continued and accelerated the federal government's involvement in state-aid.

A number of factors contributed to the change in attitudes on state-aid.[55] Not the least was the strong lobby mounted by Catholic parents' groups, the influential voice of catholic leaders particularly those in ecclesiastical office and in the leadership of the Democratic Labor Party whose primarily Catholic following kept non-Labor governments in office for many years in that preferences were allocated away from the Labor Party, the influence of leading citizens, not to mention the politicians themselves who were 'old boys', the parlous fiscal condition of many nonpublic schools, and the readiness to break the rules by Labor

politicians and school councils whose formal authorities were opposed to state-aid.[56] Altogether, the change was the result of a public pressure which the political parties seemed to decide would lead to political suicide if ignored.

4. Legal aspects of the national differences

Particular interest in the divergent approaches to state-aid in America and Australia stems from the fact that an attempt was made to incorporate the first amendment in the Australian constitution for the express purpose of preventing state support of nonpublic schools. The prime mover was A.I. Clark, attorney-general for Tasmania and a representative of that colony at the first federal convention, who was both a devotee of the American constitution and people, and an outspoken critic of state-aid. That his purpose has not been realised despite the inclusion of section 116 in the Australian constitution is due to a number of legal factors.

First, the establishment wording of section 116 is similar to but not identical with that of the first amendment.[57] There is, therefore, considerable likelihood that Australian courts will interpret the section along different lines to those followed by the Supreme Court in its dealings with the first amendment. The phrase 'establishing any religion', for example, lends itself to an interpretation based on the analogy of the establishing of the Church of England as the church in England and is different from that suggested by the words 'an establishment of religion'. Laws in Australia could do much in support of religion, on this interpretation, before approximating anything like a law for establishing any religion. Like legislation in America and Australia on state-aid is liable to different interpretation in the courts simply because different words are at issue.

Second, there is in the Australian constitution, section 96[58] for

which there is no parallel in the American constitution. In a run of cases from 1926 until the present,[59] the High Court, with the seal of the Privy Council in one instance, has asserted that section 96 gives the Commonwealth a broad power with very few limitations. Those of importance here are that it is subject to section 116 and that it is not a legally coercive power.[60] The states are free to accept or reject the grants made.

The federal statutes enabling funds to go to nonpublic schools are, in fact, section 96 laws. The States Grants Schools Acts have provided for payments to be made to the states on condition that they be paid to the public and nonpublic schools which may be sectarian or nonsectarian, and with other machinery conditions attached. The grants may be accepted or rejected by the states but if accepted the conditions must be fulfilled. On the face, therefore, the laws are section 96 statutes which are subject to section 116 but are not properly state-aid legislation per se. Section 96 appears, therefore, to impose an impenetrable buffer between the federal legislation and the operation of section 116 even if that section were interpreted along Supreme Court lines.

Third, it must be noted that were section 116 interpreted as the first amendment is at present in the U.S.A., judicial restraint placed on the use of public funds for nonpublic schools would apply to federal law alone. On the one hand, the chequered gestation of section 116 resulted in a provision 'The Commonwealth ...' despite the fact that the provision appeared in a chapter headed 'The States'.[61] On the other hand, failing a fourteenth amendment type provision, there are no judicial means available of making an interpretation of section 116 which would rule out state-aid as far as states' laws were concerned. It follows that the state-aid laws of the states are almost totally immune from legal challenge.

The states have plenary lawmaking powers subject, in particular, to sections 107[62] and 109[63] of the federal constitution, neither of which operates to restrain state-aid legislation. In addition, the provision of general rights is almost unknown in the states' constitutions and state-aid is under no constraint from this quarter. Furthermore, there is no common law reason for putting state-aid in jeopardy. Thus the door to judicial intervention as far as the states' support of state-aid is concerned is firmly closed.

Although legal argument suggests that a challenge to legislation which enables state-aid to be made available to denominational schools is unlikely to succeed in the High Court, that reason alone may not have deterred challenges in the past. Another obstacle is that of obtaining standing in the High Court. The Court gives standing to state attorneys-general and persons particularly affected by legislation. Taxpayers have been held not to be particularly affected by the outcome of governments' disbursement of their income. As the plaintiffs in the D.O.G.S.[64] case discovered, standing is not easily obtained and future challengers to state-aid might find it considerably more difficult to obtain the necessary fiat from an attorney-general, given the states' support for state-aid and that of all the major political parties.[65]

The D.O.G.S. case is expected to be decided in favour of the government and by a handsome majority thus providing for the continuance of state-aid in Australia. That decision will be decided on constitutional grounds but other matters bearing on policy should not be overlooked. These include the fact that the federal government has been making state-aid available, at a cost of many millions of dollars to the public purse, for over fifteen years and a court now hearing the question may well be reticent to break with such long-accepted political practice. In addition,

only one member of the present court, Mr. Justice Murphy, has expressed public opposition to state-aid, but when a member of Parliament and not as a judge. Further, most of the justices are products of the nonpublic schools. If there were a policy predisposition, therefore, it is likely to be in support of state-aid. Without giving undue force to these more minor considerations they, together with the weightier factors already discussed, clearly indicate the line of demarcation between American and Australian law and practice with respect to state-aid for nonpublic schools.

III

Policy implications of the law on church-state relationships

Public subvention for nonpublic church schools is severely constrained in law in America while remaining largely unfettered in Australia - thus putting at risk in the U.S.A. the viability of the main alternative to public schooling. In the former the restraint has come largely through judicial intervention in maintaining a church/state dichotomy as a matter of legal principle while in the latter the issue has been decided in the legislature and the restraints which do exist are those of fiscal concern rather than of political principle. The different outcomes in the two countries suggest a number of implications for education policymakers. Two of these raise questions of the power base in the exercise of authority in general while the remainder address questions of a more procedural kind.

The state-aid issue is inextricably tied to the interpretation of rights. The question for policymakers favouring government support for the alternative education sector in America is whether attempts should

be made to strike at the root of the opposition to state-aid, the rights provisions, by, for example, restricting their operation as far as schooling is concerned. This has been done, in fact, in Australia in cases where governments bowed to pressure for legislation incorporating rights but exempted it from operating in schools - as with the legislation in New South Wales and South Australia providing for the removal of sex discrimination in the industrial and social life of those communities. Whether the torturous path to constitutional amendment in the United States - to diminish the force of the first amendment on education, for example - is a viable one is open to question. But it is a means available to proponents of state-aid to overcome the present impasse just as in Australia educational policymakers need to be aware that constitutional amendment to include rights could well operate in favour of opponents of state-aid. An example of what may be done is provided by the attempt of Professor John E. Coons to have the constitution of California altered in 1980 by the Educational Funding Initiative Constitutional Amendment so as to provide for family choice in education and with funding which would have amounted in some cases to state-aid. Although unsuccessful in obtaining the requisite number of petitioners so as to have the matter go to the people, the strong claims that the proposal would have had popular support suggest that this attempt in particular and constitutional amendment in general are viable means for implementing policy changes.[66]

A second overarching policy consideration is that of the role of courts in education at all. While Australia still awaits its first decision on the question of state-aid and has only the one on the right to have religion enmeshed in schooling, compared with the hundreds of American cases, the principal question remains for review in both countries namely, whether non-majoritarian bodies should have the right to exercise what is political authority with respect to the state-aid

question. The ideological base to this question is not merely a political one as to which arm of government ought to be exercising what power in a democratic society. It is also a question of the exercise of power in social terms which, as far as education is concerned, may set student, parent and community at odds with each other and with government of whatever sort. Without even beginning to enumerate the issues which are raised here, it is enough merely to suggest that if judicial authority is at issue, from whatever source, policymakers need and can pass from the stage of declamatory rhetoric about the power of the courts and their exercise of it to one of examining how those powers can be amended so as to allow the free passage of public policy - if state-aid is one such policy. After all, judicial power has a legislative base, whether it be that of constitutional provision or statutory authority. And that base may be varied if the people and/or the legislature so determine.

Procedural policy issues for governments

The role of government in education is one under challenge as far as its regulatory control aspect is concerned from several sides particularly from apologists of the neo-classical liberalism, albeit much more so in America than in Australia. Without denigrating the influence of this voice, it seems unlikely that governments in either country will withdraw from the education field and, indeed, the establishment of a federal department of education and the increasing role of the state governments in funding education in the U.S.A. suggest a soundly entrenched and expanding role for government in the provision of public education. Given the very different set of circumstances in each country as far as the role of government in the nonpublic sector is concerned, it is necessary to review policy issues on a national basis.

The question for policymakers in the U.S.A. given the present judicial position on state-aid is the viability of a state-aid push by

government. Is the support for state-aid one which governments can continue to ignore without fear of reprisal at the polls? On the other hand, if the demands are not representative of the people, is a public backlash to programs for state aid of sufficient dimension as to make governments pause? In other words, the political viability of a program of state-aid is a prime consideration and requires more evidence than presently seems to be available. That viability does not stand alone as an issue in itself but is complicated in the U.S.A. by issues primarily of discrimination particularly with respect to race and sex. Policy considerations, therefore, need go not merely to the church/state debate but further to the social implications of state-aid subventions.

Second, if governments maintain a policy of diversity and choice for school education and intend to make genuine choice possible by subvention, the central questions for policymakers is how this is to be done given the barriers imposed by the Supreme Court. One approach is for governments to press ahead with legislation providing state-aid and wait for actions to have the legislation quashed. Certainly there is room for some legislative manoeuvring as instanced by Senator Moynihan's proposal of 1979 to have legislation passed which would have allowed a form of state-aid in that aid was to be made available to students at schools exempted under other law from taxation under the internal revenue code.[67] His was an approach both challenging the Congress to make a declaration on state-aid with initial cover from the Supreme Court with its decision in Walz[68] which allowed legislation providing that gifts to religious schools were tax deductible, and opponents to annul the will of Congress.

The success of such legislation and any other government initiatives to provide state-aid from the public purse hangs on a reading of the Supreme Court's decisions and the likely future attitudes of its members. Assuming that the three-part test synthesised from previous decisions in Lemon v.

Kurtzmann[69] remains, namely that legislation in support of state-aid may withstand challenge if

(a) it has a secular legislative purpose;

(b) its principal or primary effect is neither to advance nor inhibit religion; and

(c) it does not foster excessive government entanglement with religion.

the interpretation of the test by the judges suggests what type of legislation might succeed in the future.

The strong advocates, but not unconditionally so, of state-aid are Chief Justice Burger and Justices Rehnquist and White whose views on future court decisions on state-aid are reflected in the hope expressed by the Chief Justice in Meek v. Pittenger that the court will:

> came to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in Church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion - at least while this Court sits.[70]

The position of these justices, which incorporates hints to policymakers as to successful legislation as far as these three are concerned, may best be summarised again in the words of Chief Justice Burger in Nyquist when in reviewing past decisions he asserted that 'the Establishment clause does not forbid governments, state or federal, from enacting a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" instruction or worship'.[71]

Hard line opposition to state-aid in the form of almost constant rejection of state-aid legislation can be expected to continue from Justices Stevens, Marshall and Brennan. In their opinion almost any involvement of government and religion is suspect and they have laid stress on the politically divisive nature of such legislation.

There remains the 'swinging vote' of Justices Powell, Blackmun and Stewart who are prepared as per Justice Powell in Nyquist to assert on the one hand that 'an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law' and take into account, on the other, whether state-aid 'carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion'.[72] If policymakers want to advance state-aid, the deliberations of this grouping of justices will repay particular attention.

In summary, legislation which provides benefits which flow exclusively or in the main to the nonpublic sector is unlikely to withstand challenge in the courts. Aid may validly flow to the nonpublic sector, however, where it is incidental to the provision of assistance to a broad class of beneficiaries and where there is an obvious public welfare motif. Suggestive as this conclusion might be of the course of action open to policymakers intent on providing state-aid, it also introduces a further complication if the future of state-aid in America is tied to changes in general methods of school funding, as it seems to be. Advocates of such changes on the grounds of the need for more parental choice in education might, as Sugarman has suggested, be less likely to pursue their goals if advantages are to be reaped by denominational schools. Be that as it may, given the Supreme Court's decision in Rodriguez, which has closed the door at least at present to claims that education is a fundamental interest and, therefore, the possibility of having state-aid upheld on the grounds that the equal protection provision enables the state to assist parents with children in nonpublic schools in the exercise of their rights in terms of the Pierce decision, the first amendment provides the hurdle to state-aid. Members of the Supreme Court have indicated how it might be successfully jumped. If policymakers can

shed their myopic attitudes to state-aid and concentrate on aid to students, state-aid could well follow.

Policymaking in advance of state-aid is much less constrained in Australia than in the U.S.A. in that the judicial arm of government has not yet intervened to impose obstacles to its continuance. The immediate issues, therefore, relate to governments' capacities to ameliorate the demands of proponents of state-aid for more support and those of its opponents for increased support for the public systems of education. At the national level, in particular, where government support for the nonpublic sector is most marked as by comparison with its subvention to public schools (given the belief that the allocation of power in the Australian federal system reposes power with respect to education in the states whose responsibility public education, therefore, is), need is greatest for an observable balance in commitment to the various sectors. These problems faced by policymakers would undoubtedly have currency in the U.S.A. were governments there as unfettered in their capacity to provide state-aid as their counterparts in Australia.

To round off the situation in Australia, policymakers might be otherwise exercised were judicial opinion on the scope of section 116 such as to prevent state-aid. Given the already mentioned absence of a fourteenth amendment equivalent in the Australian constitution, an adverse decision on state-aid would only affect Commonwealth laws. The states would be free to continue with their state-aid programs. Federal advisors would have several options open to them including

(a) seeking a constitutional amendment which, given the propensity of Australians not to support such changes and the very socially devisive nature of the issue, would seem an unwise course of action and one only to be pursued as a last resort;

(b) proceeding to use other constitutional means such as the benefits to students provision[74] with due consideration of the stand of the High Court in deciding against state-aid; and

(c) making payments to the states in such a way as to overcome judicial objectives, so that the states could, in effect, maintain the present level of support for the nonpublic sector.

With these options, Australian policy with respect to state-aid would be likely to suffer only inconvenience were there a judicial decision adverse to present policy, and certainly no major set-back.

Lobby interests and state-aid

Interests in support of state-aid in America are subject to the already mentioned frustrations facing governments desirous of supporting state-aid in that country. Theirs is, therefore, a supportive role where governments and political parties are favourably disposed and an agitative one where not.

Opponents of state-aid will no doubt continue the policy of using the courts to test any expansion of state-aid support. Were the judicial interpretation to change either of its own account as a result of changes in the membership of the Supreme Court or with the passing of legislation not in violation of the constitution as presently interpreted, this lobby would need to revert to the general political arena to fight its cause. Without any conclusive evidence on the point, it may be suggested that this lobby might still win the day were the matter to be publicly decided.

State-aid in Australia is entrenched in the platforms of all the political parties likely to come to government and seems to have considerable public support. If no assistance is forthcoming from the judiciary by way of a ruling against state-aid, or if such a decision is easily circumvented, opponents of state-aid have few options open to them apart from a continual gnawing at the political structures. Their frustration may be compounded by the fact that a judgement in favour of state-aid in Australia might well see a proliferation in the number and type of church schools.

Conclusion

There is no simple statement which would nicely round off this study. The legal issues are complex and the policy implications equally so. Much depends on one's perspective as to whether the courts have been a help or a hindrance in their policymaking role with respect to state-aid. What is certain is that policymakers in the U.S.A. need to take cognizance of the courts in framing policies on state-aid and their counterparts in Australia, while likely to be less guarded, cannot totally ignore the judicial arm of government.

Notes

1. Support for the research for this paper came from the University of Western Australia, the Institute for Educational Policy Studies at Harvard University and the U.S.-Australia Educational Policy Project. Appreciation is noted of that assistance and criticisms of drafts of this paper offered by Australian and American scholars, in particular, those of Professor Betsy Levin, Professor in Law at Duke University, North Carolina.

2. In this article the term 'public', interspersed with 'government' or 'state' for relief, shall be used of government-operated schools (some of the private schools in Australia are called Public Schools). The terms 'nonpublic', 'private', and 'independent' will be used of nongovernment-operated schools and these terms will be broken down into 'sectarian' or 'denominational' and 'nonsectarian' where appropriate.

3. The 1891 convention approved a clause which read: "... nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws" as did also the convention at Adelaide in 1897. In Sydney later that year Tasmania gave notice of an amendment to read: "... nor shall a State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws" (almost vintage fourteenth amendment). The Tasmanian amendment was later defeated 23-19 and the original equal protection clause suffered defeat shortly afterwards. It was argued, apparently persuasively, that the reasons for these inclusions in the American constitution did not apply in Australia. One member, Dr. Cockburn, said of the amendment: 'Why should these words be inserted? They would be a reflection on our civilization.' And again, 'People would say "Pretty things these States of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice"'. Official Record of the Debates of the Australian Federal Convention, Third Session, Melbourne, 20 January to 17 March 1898, Melbourne, Government Printer, n.d., pp. 688-691.

4. Cantwell v. Connecticut 310 U.S. 296, 303 (1940).

5. Illinois, ex rel. McCollum v. Board of Education 333 U.S. 203 (1948).

6. Abington School District v. Schempp 374 U.S. 203 (1963) and the companion case Murray v. Curlett.

7. The impact of the formal decision is always another matter. While there seems to be no recent survey of religious practices in public schools, evidence for their continuance is not hard to find.

8. Zorach v. Clauson 343 U.S. 306 (1952).

9. For the most recent survey of religious education in Australia's public schools, see Black, Alan W., Religious Studies in Australian Public Schools: An Overview and Analysis, Hawthorn, Australian Council for Educational Research, 1975.

10. Section 17 of the Public Instruction Act 1880.

11. Section 18 of the Public Instruction Act 1880.

12. Section 7 of the Public Instruction Act 1880.

13. Section 20 (2) of The Education Act of 1964.

14. Benjamin v. Downs (1976) 2 N.S.W.L.R. 199, 209.

15. The court relied heavily on the interpretative evidence of an associate professor in history, who was head of the department of ecclesiastical history at the University of Sydney, who was able to differentiate Bible stories and the Apostles Creed as not being dogmatical theology and being such theology respectively.

16. As the states' curricula tend more towards teaching about other religions, it remains to be seen whether a case might be brought seeking exclusive rights for the teaching of the Christian religion. Given the decision in this case and the implied common law recognition of Christianity as the religion of the realm it might just succeed.

17. Wisconsin v. Yoder, 406 U.S. 205 (1972).

18. Section 30 of the Western Australian Education Act 1920 reads: 'It shall not be required, as a condition of any child being admitted into or continuing in any school, that he shall attend or abstain from attending any Sunday school, or any place of religious worship, or that he shall attend any religious observance or any instruction in religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent, or that he shall, if withdrawn by his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs.'

19. Section 46 of the Tasmanian Constitution Act reads: '(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take an oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.'

20. Studies going beyond the school biography type of analysis to empirical studies, particularly of the perceptions of the nonpublic sector's participants, are not common but see Leonard L. Baird, The Elite Schools: A Profile of Prestigious Independent Schools, Lexington, MA, D.C. Heath and Co., 1977, and J.J. Smolicz and J.M. Smith (ed.) Melbourne Studies in Education 1978, Melbourne, Melbourne University Press, 1978.

21. Nonpublic Education and the Public Good: The Presidents' Panel on Nonpublic Education; Final Report, Washington, D.C., Government Printer, n.d., p. 5 (hereafter cited as The Presidents Panel).

22. Schools Commission: Triennium 1979-81: Report for 1979, July 1978.

23. George Gallop, How the Public Views Nonpublic Schools, Princeton, N.J., Gallop International, 1969, pp. 6, 10 and 12. In the state of Victoria, for example, in a movement partly attributable to teachers' industrial action there has been a significant increase in nonpublic school enrolments.

24. Presidents Panel, p. 7.

25. Nyquist, op. cit., pp. 767-8. The usefulness of profiles in general and this one in particular is open to question in that assuming a school required at least six of the eight features enumerated to remain within the profile, most church schools in Australia, other than the Catholic ones, would probably fall outside the profile. But they would unquestionably be perceived by the community, themselves, and the state as church, i.e., sectarian, schools.

26. U.S. Department of Health, Education and Welfare, Nonpublic School Directory 1965-66: Elementary and Secondary Schools, Washington, D.C., U.S. Government Printing Office, 1968.

27. In Australia, for example, the Headmasters Conference of the Independent Schools of Australia and the equivalent association for girls schools, the Association of Heads of Independent Girls Schools, comprises representatives of about one quarter of the nonpublic sector and again within the former of these are the Public Schools - associations of the most elite nonpublic schools known, in New South Wales, as the Greater Public Schools. These groups are distinguishable from the conglomerate associations of nonpublic schools such as the National Council of Independent Schools in Australia and the National Associations of Independent Schools and the Council for American Private Education in America.

28. This is a comment based on personal perception gained through a combination of conventional wisdom and personal contacts rather than tight research which is singularly lacking.

29. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

30. Id. pp. 534-5.

31. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

32. See the South Australian Education Act 1972, passim. Section 73 (1) of the Act provides that the minister for education may visit a school on its governing body's request.

33. Article 65 §3210 2(c) of the New York State Education Law, which specifies which private schools teaching ten named "branches of learning" and at what level shall be registered. There is also another classification for private business schools from which public and religious bodies, and certain types of institutions, are exempted.

34. Annotated Laws of Massachusetts GL c76 §1, School Attendance Regulated.

35. Id.

36. Section 14 of the Western Australian Education Act 1928-1976.

37. Section 32B (1) of the Western Australian Education Act 1928-1976. Note that there is no discretion in either state for the school committee or the minister to withhold recognition if the stated criteria are satisfied.

38. Section 32B (3) of the Western Australian Education Act 1928-1972.

39. Schools Commission: Triennium 1979-81: Report for 1979, Canberra, Schools Commission 1978, p. 7 and 20. All schools are ranked in one of six categories with the schools in category six - the poorest schools on a resources/student basis - receiving the largest sums.

40. The so-called Blaine Amendment (section 4 of Article IX) reads: 'Neither the state nor any subdivision thereof shall use the property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught but the legislature may provide for the transportation of children to or from any school or institution of learning'. The last saving clause excepted, Blaine had attempted to have this proposal nationally enforced, but failed to win the necessary congressional support. New York State adopted the proposal shortly after Blaine's death.

41. The New York legislature, for example, passed the Secular Education Services Act in 1971, making available $33 million in aid of teaching costs in secular subjects in nonpublic schools. The governor signed the legislation into law.

42. See Gallop, op. cit. at p. 9 for evidence of public support for private and public schools and at p. 10 for a public expression of opposition to state-aid.

43. Everson v. Board of Education, 330 U.S. 1 (1947).

44. School District of Pittsburgh v. Pennsylvania 47 S.C.L.W. 3822 (1979).

45. Cochran v. Louisiana State Board of Education 281 U.S. 370 (1930).

46. Wolman v. Walter, 45 U.S.L.W. 4861 (1977). Note the response (now under appeal) of the District Court to this decision in that the Court allowed the schools to keep the equipment and material found to have been invalidly supplied. The Court held: (a) the material was subject to obsolescence and the violation would, therefore, be impaired by time, (b) the denial of the relief sought alleviated the necessity of an unconstitutional entanglement of church and state, and (c) the material in question is duplicative of that in public schools.

47. Walz v. Tax Commission, 397 U.S. 664 (1970).

48. Lemon v. Kurtzmann, 403 U.S. 602 (1971) and the companion case, Earley v. Dicenso.

49. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

50. Public Funds for Public Schools of New Jersey v. Byrne, 47 U.S.L.W. 3775 (1979).

51. The Assisted Schools Abolition Act 1895, sections 2 and 3. Under the Act for Termination of the Parliamentary Ecclesiastical Grant of 1895, the four major denominations (Church of England, Roman Catholic, Wesleyan, Presbyterian) were paid over 35,000 pounds in lieu of the ecclesiastical grants which were to cease. 1895 was, therefore, a year of separation of state and church.

52. Section 9A (1) of the Education Act, 1928. The Assisted Schools Abolition Act, 1895 was repealed in 1964.

53. Assistance by this means came into force in 1915 and has developed from tax concessions for gifts to church schools to income tax deductions for education costs, which, while available to all, were clearly of most assistance to taxpayers paying fees.

54. For a detailed study of the science laboratories program, see D. Smart, "Federal Aid to Australian Schools: Origins and Aspects of the Implementation of the Commonwealth Science Laboratories and Libraries Schemes", unpublished Ph.D. thesis, Canberra, Australian National University, 1975.

55. For a treatment of aspects of the state-aid controversy see P.N. Gill, 'The Federal Science Grant: An Episode in Church and State Relations, 1963-64' in E.L. French (ed.), Melbourne Studies in Education 1964, Melbourne University Press, 1965.

56. It was not unknown for church schools to be applicants for state-aid grants while the respective church authorities were publicly expressing opposition to state-aid. The schools obtained their grants.

57. The history of the development to the present section 116 runs as follows. After 1891 the wording was "A State shall not make any law prohibiting the free exercise of any religion." In 1897 this was accepted without debate. Later that same year in Sydney, the wording remained unaffected but Tasmania gave notice of an amendment adding "nor appropriate any proportion of its revenues or property for the propagation or support of any religion." In 1898 an amendment to replace the clause with "A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of religion, or for the establishment of any religion, or imposing any religious observance" was negatived, as was the Tasmanian amendment as, indeed, was the original clause, it being regarding as anachronistic and unnecessary, given there was no power in the Commonwealth to make laws with respect to religion. A little later a new proposal similar to the present provision was introduced, "the States" being removed out of respect for states rights. The clause was admitted to counter the provision in the preamble, successfully added to the constitution after the defeat of the amendment mentioned above, which indicated that the people of the

states proceeded to unite in one Commonwealth 'humbly relying on the blessing of Almighty God'. See Official Record of the Debates of the Australian Federal Convention, Third Session, Melbourne 20 January to 17 March 1898, vol. 1, Melbourne, Government Printer, n.d., especially pp. 664 and 1779.

58. Section 96 reads: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks fit". The provision added by the Prime Ministers of the colonies who met in 1899 in a successful attempt to reconcile differences about the constitution. Not only did the federation fathers not have the opportunity of discussing this section, they positively rejected a like-worded proposal on the grounds that it might encourage a mendicant mentality in Commonwealth-State relations.

59. For a convenient summary of most of the cases and the arguments of the court, see the judgement of Dixon, C.J., in Victoria v. Commonwealth (1957), 99 C.L.R. 575, pp. 605-611.

60. The court does not concern itself with political coercion which has in fact been very real. Only on one occasion, in 1965, have the states refused an education grant. Effective use of section 96 to attain federal policy is not difficult to exemplify as with the 1974 states grants acts in higher education which required the states not to charge fees at the tertiary level and implemented the Labor government's policy of free higher education.

61. See note 57 for the procession from "A State" to "A State shall not, nor shall the Commonwealth" to "The Commonwealth".

62. Section 107 reads: 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be'.

63. Section 109 reads: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

64. Attorney-General for Victoria, ex rel Black and ors v. Commonwealth. The original writ was lodged in December 1973. The relators are members of the Victorian Council for the Defense of Government Schools and the case is known by the acronym D.O.G.S. The High Court has yet to bring down the decision in this case, the first to challenge state-aid in Australia in the courts.

65. Compare Flast v. Cohen, 392 U.S. 83 (1968) in which the court lowered the barrier as far as standing for taxpayers qua taxpayers was concerned. Murphy, J. made reference to the need for liberalizing the rules on standing in the High Court in Victoria v. Commonwealth and Hayden (1975) 134 C.L.R. 338, p. 425, but there seems to be no great enthusiasm in the court for such a move.

66. In the context of the reform of education funding, constitutional revision has been held out as "the greatest hope for meaningful reform" (Mark G. Yudof and Daniel C. Morgan, "Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas - the Politics of School Finance Reform" in Levin, Betsy (ed.) Future Directions for School Finance Reform, Lexington, D.C. Heath, 1974, p. 107) and such means of reform has been pursued by John E. Coons in California. It was also the means by which the federal government in Australia obtained the power to provide benefits to students - its only stated education-related power.

67. 96th Congress, 1st Session, S.1101 - To amend subpart 1 of part A of title IV of the Higher Education Act of 1965 to provide for basic educational opportunity grants for elementary and secondary school students, and for other purposes.

68. Walz v. Tax Commission, 397 U.S. 664 (1970).

69. Lemon v. Kurtzmann, 403 U.S. 602.

70. Meek and ors. v. Pittenger, 421 U.S. 349, 387 (1973).

71. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 799 (1973).

72. Id. at 778 and 794.

73. San Antonio Independent School District v. Rodriguez , 411 U.S. 1 (1973).

74. That provision enables the Commonwealth to make laws with respect to the provision of benefits to students (section 51 (xxiiiA)). There is no general welfare provision in the Australian constitution.